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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

RICHARD E. HAWK, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved . . .	3
Statement of the Case	4
Reasons for Granting the Writ	
1. The Ninth Circuit Court of Appeals has rendered a decision in conflict with the Seventh and Fifth Circuit Courts of Appeals on the same matter, viz, interpreting Bishop v. U.S., 412 U.S. 346, 36 L.Ed.2d 941 (1973), and its definition of the instruction to be given to the jury on the meaning of the word "willful" as applied to federal tax misdemeanors	10
2. The Ninth Circuit Court of Appeals has decided a question interpreting the decision of this Court in Bishop v. United States which is in conflict with the requirements of Bishop, viz, the definition to be given to the jury of the meaning of the word "willful" as used in instructions to the jury in federal tax misdemeanors	13

Page

3. The trial court's refusal to follow Bishop and the inconsistent instructions given by the trial court require this Court to exercise its jurisdiction in supervising the conduct of criminal cases, where, as here, the "close case" doctrine of Glasser vs. U.S., 315 U.S. 60, 67, 86 L.Ed.2d 680, 697-698 (1942) is involved. 15

Conclusion 20

Appendices

Opinion, U.S. v. Hawk, of Court of Appeals for the Ninth Circuit . . . . . Appendix I

Opinion, U.S. v. McCorkle, of Court of Appeals for the Seventh Circuit . . . Appendix II

Opinion, U.S. v. Klee, of Court of Appeals for the Ninth Circuit . . . . . Appendix III

Opinion, U.S. v. Sullivan, United States District Court, D. Montana . . . . Appendix IV

CITATIONS

	Page
Cases	
Bishop v. United States, 412 U.S. 346, 36 L.Ed.2d 941 (1973)	2,5,6,9, 10,11,12, 13,15,16, 17,19
Davis v. Alaska, ___U.S.___, 39 L.Ed.2d 347 (1974)	20
Glasser v. U.S., 315 U.S. 60, 86 L.Ed.2d 680 (1942)	16,18
Mann v. United States, 319 F.2d 404 (5th Cir. 1963)	17
Morrissey v. Brener, 408 U.S. 471, 33 L.Ed.2d 484 (1972)	20
Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956 (1968)	20
United States v. Hawk, ___F.2d___, Slip Opinion (Reproduced in Appendix I)	9,11,14,19
United States v. Klee, ___F.2d___, 74-1 USTC ¶9411 (1974)(Reproduced in Appendix III)	14
United States v. Matanky, 482 F.2d 319 (9th Cir. 1973)	15
United States v. McCorkle, ___F.2d___, 74-1USTC ¶9347(1974) (Reproduced in Appendix II)	11,12

Page

United States v. Sullivan,
F.Supp.___, 74-1 USTC ¶9292
(1974) (Reproduced in Appendix IV) 15

United States v. Tunnell,
481 F.2d 149 (5th Cir. 1973) 12,13

Wardius v. Oregon,
412 U.S. 470, 37 L.Ed.2d 83 (1973) 20

Williams v. Florida,
399 U.S. 78, 26 L.Ed.2d 446 (1970) 20

Statutes

26 U.S.C. §7203 3,4,5,11

28 U.S.C. §1254(1) 2

Rules

F.R.Crim.P. 30 6

F.R.Crim.P. 41 5

Other Authorities

Devitt & Blackmar,
Federal Jury Practice & Instructions 16

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

RICHARD E. HAWK, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner RICHARD E. HAWK, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 15, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix I hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1974. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

I. WHETHER BISHOP V. UNITED STATES, 412 U.S. 346, 36 L.Ed.2d 941 (1973), REQUIRES THAT INSTRUCTIONS TO THE JURY DEFINING "WILLFULNESS" EMBODY THE CONCEPT OF AN INTENT OF "BAD PURPOSE OR EVIL MOTIVE".

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

"7203. Willful failure to file return, supply information, or pay tax

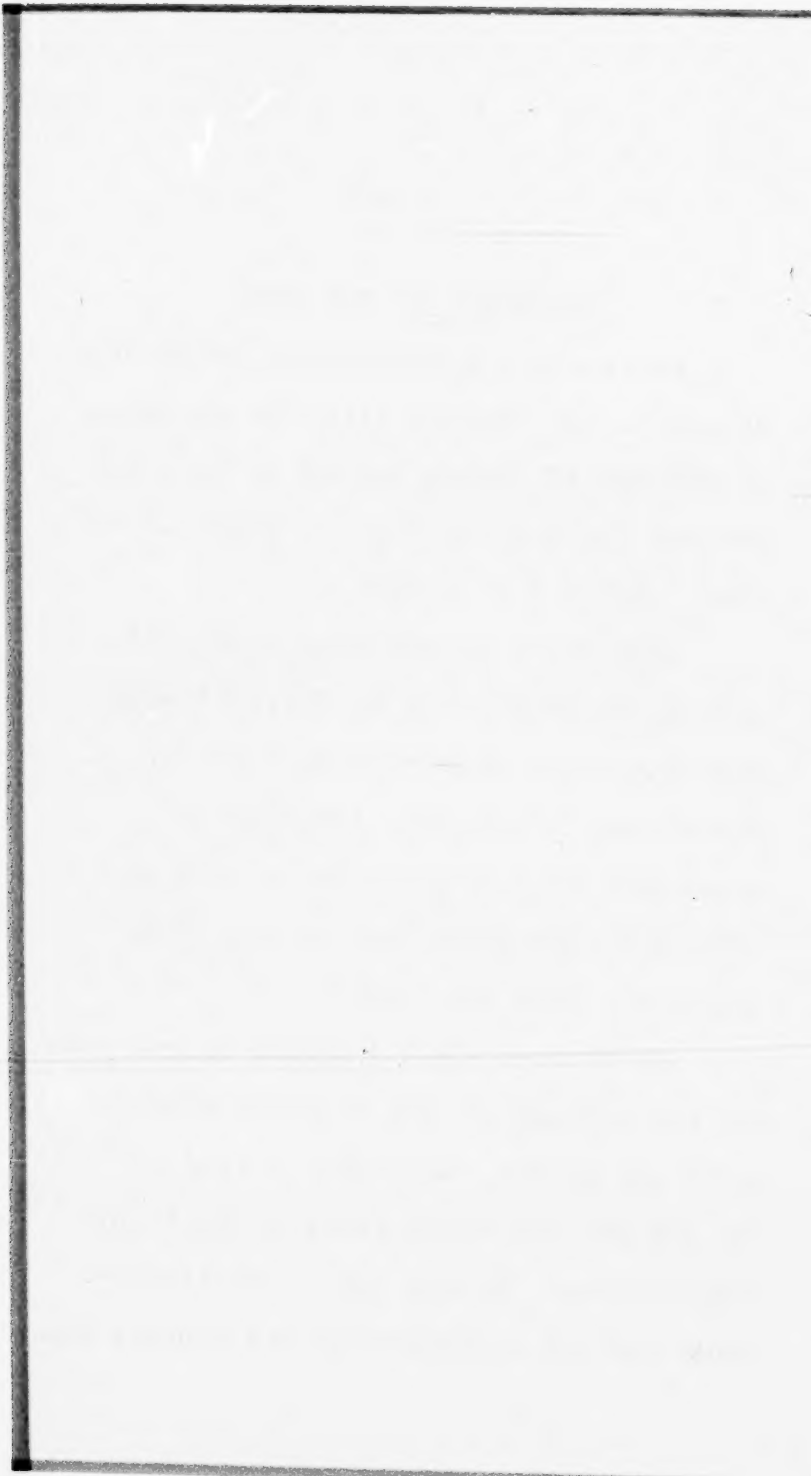
Any person required under this title to pay any estimated tax or Tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." (Emphasis added).

STATEMENT OF THE CASE

Petitioner, a practicing California attorney, was charged with the misdemeanor offense of having failed to file his federal tax returns for the years 1966-1969. (26 U.S.C. §7203).

Jury trial on the four count information, presided over by United States District Judge Stanley Weigel at San Francisco, California, resulted in acquittal of petitioner as to 1966 and 1967 and conviction upon counts three and four, 1968 and 1969.

Petitioner was sentenced to one year in the custody of the Attorney General, with six months suspended, a fine of $3,000.00, and three years probationary supervision. He was and is at liberty upon his own recognizance and mandate has



been the subject of an application for stay. [F.R.App.P. 41(b)][1/]

During trial, instructions were submitted by petitioner following the language of Bishop v. United States, 412 U.S. 346, 36 L.Ed.2d 941 (1973) on the definition of "willfulness" as utilized in §7203 of Title 26, the charging statute.

1/ Petitioner has no prior record of police or disciplinary action, remains a member in good standing of the Bar of the State of California (and is in active practice). The gross income involved in 1968 was approximately $28,000.00 and ran to a low of $11,000.00 in 1966.

The proffered instructions requested the trial court to charge the jury in the language of Bishop that willful means with the specific intent to fail to do something the law requires to be done, "that is to say with bad purpose and/or evil motive either to disobey or to disregard the law."2/

The trial court at first said, "I may use that language. . ." (RT 259) and "I'm going to say 'or evil motive'." (RT 262) The government mounted an attack upon the tentative decision: " . . . well, the Supreme Court was not talking about a 7203." (RT 262) and ultimately

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2/ Defendant's Requested Instructions, D3 and D5. This was the language approved in Bishop. Objections at trial and upon settlement of instructions was always made. F.R.Crim.P. 30

the Court rejected both defendant's D3 and D5 as to the use of the phrase "with bad purpose and/or evil motive either to disobey or to disregard the law."

The jury was first instructed that willful means ". . .voluntary and purposeful and with specific intent to fail to do what he knew the law requires to be done; that is to say, with the bad purpose to disobey or disregard the law . . ." (RT 397) After deliberating for a period of time the jury sent a note to the Court: "May we have a definition of willfulness?" (RT 409-410) Returned to the Court, the jury was instructed again.

However, the Court failed this time to use even the phrase "bad purpose".

When both counsel called this to the court's attention at the side bar, the Court said, "Well, I did that deliberately and I'm going to do that again, but I'm going to say the purpose to disobey or disregard the law is a bad purpose." (RT 415)

The Court then instructed the jury using only the phrase "bad purpose". (RT 415-417)

The jury acquitted defendant on two counts and found him guilty on two.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the conviction, stating:

> "The Supreme Court's opinion extends to the definition of willfulness in the other criminal tax

statutes in which it is an element, §§7201-07, including, of course, the provision under which Hawk stands accused, §7203. The reason Bishop does not compel inclusion of the term 'evil motive' is much simpler: an issue concerning the necessity of employing that language was not presented in Bishop. The Court was confronted only with the permissibility of the two-level definition of willfulness, and beyond that nothing in the case related to the precise form of words necessary to convey the meaning of willfulness.

"Still, a nagging question remains as to Justice Blackmun's reference to 'evil motive'; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive described in Murdock v. United States, 290 U.S. 389 (1933)...."

U.S. v. Hawk, __F.2d__, Slip Opinion at p.4, Appendix I

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals has rendered a decision in conflict with the Seventh and Fifth Circuit Courts of Appeals on the same matter, viz, interpreting Bishop v. U.S., 412 U.S. 346, 36 L.Ed.2d 941 (1973), and its definition of the instruction to be given to the jury on the meaning of the word "willful" as applied to federal tax misdemeanors.

The rule that the word "willful" in the tax crime felony statutes had a different meaning than in tax crime misdemeanor statutes had divided the circuits until this Court's decision in Bishop v. United States. (412 U.S. at 348 n.2, 36 L.Ed.2d at 944 n.2)

Bishop declared that the ". . . word 'willfully' has the same meaning in both statutes." The formulation of the requirement of willfulness is "bad faith or evil

intent, . . . evil motive and want of justification. . . ." (412 U.S. at 360, 36 L.Ed.2d at 951) ". . . Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in Murdock, supra. . . ." (412 U.S. at 361, 36 L.Ed.2d at 951-952)

The Ninth Circuit, in U.S. v. Hawk, ___F.2d___, (Appendix I) held that Bishop does not compel inclusion of the term "evil motive" and approved the trial court's giving of instructions omitting the formulation laid down by Bishop.

In conflict, the Seventh Circuit, in United States v. McCorkle, ___F.2d___, No. 73-1084, April 8, 1974, 74-1 USTC ¶9347 (Appendix II), considering a violation identical to Hawk, 26 U.S.C. §7203, held that Bishop "requires a demonstration

of 'bad faith or evil intent' or 'evil motive and want of justification in view of all . . . circumstances'. . . ." ___F.2d at ___, 74-1 USTC ¶9347, p.83,802 (Appendix II)

The instruction given in McCorkle read,

> "The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law." (__F.2d at ___, 74-1 USTC ¶9347, p.83,803)

The Seventh Circuit reversed, holding that the trial court's instructions did not meet the requirements of Bishop.

The Fifth Circuit, like the Seventh, interprets Bishop to require, as to willful attempt, "evil motive". U.S. v. Tunnell, 481 F.2d 149 (5th Cir. 1973) The Court noted that certain understate-

ments of income by the taxpayer "permits an inference of willfulness sufficient to create a jury question." (481 F.2d at 152) Obviously, the instruction to the jury on the question must involve the words "evil motive".

2. The Ninth Circuit Court of Appeals has decided a question interpreting the decision of this Court in Bishop v. United States which is in conflict with the requirements of Bishop, viz, the definition to be given to the jury of the meaning of the word "willful" as used in instructions to the jury in federal tax misdemeanors.

The Ninth Circuit has interpreted Bishop variously, with the decision in Hawk being inconsistent with decisions of other panels within the circuit.

Exercise of this Court's jurisdiction to clarify the "nagging question . . . as to Justice Blackmun's reference to 'evil motive'. . . ."(U.S. v. Hawk, ___F.2d___, Slip Opinion, p.4, Appendix I) would assist in both settling the law and guiding the trial courts.

One panel of the Ninth Circuit, in U.S. v. Klee, ___F.2d___, No. 73-2741, March 27, 1974, 74-1 USTC ¶9411, (Appendix III) approved an instruction given by United States District Judge Albert C. Wollenberg defining willful as "voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done, that is to say, with a bad purpose or evil motive to disobey or disregard the law. . . ." (___F.2d at ___, n.1, 74-1 USTC ¶9412 at p. 84,005 n.1, Appendix III)

Still another panel, in U.S. v. Matanky, 482 F.2d 319 (9th Cir. 1973) stated in a footnote:

> "The trial court's failure to include the concept of 'bad purpose' or 'evil intent' in its charge regarding 'willful' as required in criminal tax prosecutions, Bishop v. United States, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973), to which no objection was made, is not here plain error requiring reversal." (482 F.2d at 1324 n.4)

Another District Court in the Ninth Circuit, reviewing Bishop, states that there be "The bad purpose or evil motive required by Bishop." U.S. v. Sullivan, ___F.Supp.___, Cr. No. 4518, D.Mont., January 28, 1974, 74-1 USTC ¶9292, Appendix IV.

3. The trial court's refusal to follow Bishop and the inconsistent instructions given by the trial court

require this Court to exercise its jurisdiction in supervising the conduct of criminal cases, where, as here, the "close case" doctrine of Glasser vs. U.S., 315 U.S. 60, 67, 86 L.Ed.2d 680, 697-698 (1942) is involved.

A defendant in a criminal trial must premise his argument to the jury upon the Court's instructions. Bishop provided a somewhat short phraseology for willfulness -- "bad purpose or evil motive". The phrase, in its entirety, is important for the explanation each adjective gives to the other and to its explanation of all that comes before in the "standard instruction".3/

3/ See, Devitt & Blackmar, Federal Jury Practice & Instructions, §13.03, "knowingly", which compounds the confusion where "bad purpose or evil motive" is omitted from §§16.07 and 16.13 instructions.

Bishop requires the trial court to instruct with a phrase equally descriptive if its exact words are not to be used. At the least, "instructions must be consistent and not misleading". Mann v. U.S., 319 F.2d 404, 410 (5th Cir. 1963)

Here, the requirement of Bishop was not met and, unfortunately, the instruction given after the jury requested furthere information on willfulness was deliberately given without even the phrase "bad purpose". (RT 415) The error is one both in violation of this Court's decision in Bishop and the rule that instructions may not be misleading. "The fact that one instruction is correct does not cure error in giving another inconsistent one." Mann, supra.

This Court's exercise of its supervisory power over criminal trials by a grant of certiorari to promote a fair

trial has often been determined in the past by reference to the so-called "close case doctrine" of Glasser v. United States, 315 U.S. 60, 67, 86 L.Ed.2d 680, 697-698 (1942).

The instruction was obviously crucial -- the jury returned to the courtroom to hear a further definition of willfulness. (RT 412)

The evidence was not overwhelming -- the jury acquitted defendant on two counts of a series of continuous conduct.

The government specifically eschewed any fraud, evasion, or atmosphere of such: The prosecutor stated, "This is not a case in which there is any question of lying, cheating or defrauding the government . . . There's no charges that Mr. Hawk attempted to cheat the Federal Government, indeed that he had any tax liability at all, . . ." (RT 20)

The Ninth Circuit, affirming, cautioned that evidence which had been admitted over objection was "not very relevant, (but) was material on the issue of willfulnes. . ."

> "We add a note of caution. Evidence of such limited relevance must be admitted with care. In some instances, the potential for prejudice as well as the dangers of consuming undue time and confusing the jury may be so great as to warrant its exclusion." (___F.2d at___ n.7, Slip Opinion, p.7, Appendix I)

The opportunity to defend the criminal charge on the merits of the key issue -- state of mind -- was seriously curtailed by the failure to follow Bishop's definition of willfulness.

CONCLUSION

A series of this Court's decisions have made clear that the defendant's right to a full and fair opportunity to contest the charges in the courtroom, represented by counsel, fully prepared, will not be curtailed.[4/] Like both the right to counsel and to full tools for cross examination, the right to argue the evidence to a jury which has had defined to it by the Court the crucial element of willfulness in clear, unambiguous, and consistent terms is essential to a fair trial.

4/ e.g. Davis v. Alaska, ___U.S.___, 39 L.Ed.2d 347 (1974); Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446 (1970); Wardius v. Oregon, 412 U.S. 470, 37 L.Ed.2d 82 (1973); Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956 (1968); cf., Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972)

The circuits are in conflict as to what the definition of that crucial term should be. One circuit, the Ninth, cannot agree internally. In the case itself, the trial court did not consistently instruct.

For all the reasons heretofore, certiorari should be granted.

Respectfully submitted,

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June 13, 1974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

RICHARD E. HAWK, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530, Counsel for Respondent. I further certify that all parties required to be served have been served.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD E. HAWK, *Defendant-Appellant.*	No. 73-2800 OPINION

[May 15, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: MOORE,* BROWNING and CHOY,
Circuit Judges.

CHOY, Circuit Judge:

Hawk was charged with willfully failing to file federal income tax returns for the years 1966, 1967, 1968, and 1969 in violation of 26 U.S.C. §7203.[1]

Hawk, an experienced attorney, admitted knowledge of his obligation to file returns and failure to do so. His excuse was that in the first years he was confronted with serious personal problems which left his affairs in disarray; thereafter, he said he "had

*The Honorable Leonard P. Moore, United States Senior Circuit Judge for the Second Circuit, sitting by designation.

[1]That section provides in pertinent part:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . , keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . .

a mental block about it" and that "he just sort of stuck his head in the sand." The jury found him guilty on the counts covering 1968 and 1969 and acquitted him as to the two previous years. We affirm.

Instructions on Willfulness

The trial judge instructed the jury that the defendant's failure to file would be willful if the "failure to act was voluntary and purposeful and with the specific intent to fail to do what he knew the law requiresc (sic) to be done; that is to say, with the bad purpose to disobey or disregard the law . . . ."[2] This followed word for word an instruction requested by Hawk except for one omission: in the last clause, Hawk's requested instruction read, "that is to say, with the bad purpose *and/or evil motive* either to disobey or disregard the law." (Emphasis added.) Hawk argues that *United States v. Bishop*, 412 U.S. 346 (1973), required the trial court to include this "evil motive" language. We do not agree.

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[2]The charge as relevant to willfulness was:

> Now, we come to specific intent and willfulness. The specific intent of willfulness is an essential element of the crime of failing to make an income tax return. The term "willfully" used in the statute . . . means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under this criminal law.
>
> . . . The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what the law requires (sic) to be done; that is to say, with the bad purpose to disobey or disregard the law that requires him to disclose to the Government facts and (sic) material to the determination of his income tax liability. . . .
>
> There is no necessity that the Government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. That is, the intention to avoid the law or to pay the taxes constitutes the crime charged by each of these counts as long as it is willful and knowing as I have defined the term for you. On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law, if there was such misunderstanding.

In reversing a decision of this court, 455 F.2d 612 (1972), the *Bishop* Court overturned a line of decisions of this circuit[3] which had established two levels of willfulness applicable separately to felony and misdemeanor offenses under 26 U.S.C. §§7201-07 of the criminal tax statutes. Where the crime charged was a felony, as is, for example, a willful evasion of tax under §7201, we had required that there be a specific intent to commit the illegal act knowing of the legal obligation. On the other hand, where the crime charged was a misdemeanor, as is, for example, a failure to file under §7203, a looser instruction was required in which willful was defined as, among other things, "capriciously or with a careless disregard whether one has the right to act." *E.g., Abdul v. United States*, 254 F.2d at 294. Though confining itself to this issue, the Court, in a concluding statement, gave rise to Hawk's argument here. Justice Blackmun, writing for the Court, stated that "Until Congress speaks otherwise, we . . . shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described" in *Murdock v. United States*, 290 U.S. 389 (1933). *United States v. Bishop*, 412 U.S. at 361 (emphasis added).

The Government contends that *Bishop* does not compel an instruction using the "evil motive" language on the narrow ground that the Court's decision was limited to the two criminal tax statutes before it—§7206(1), the felony of willfully subscribing to a false return, and §7207, the misdemeanor of willfully "delivering" a false statement. But as the quoted statement above indicates, and as the remainder of the opinion makes crystal clear,[4] the Court's opinion extends to the definition of willfulness

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[3]*United States v. Haseltine*, 419 F.2d 579, 581 (9th Cir. 1969) (§§7201 and 7203); *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963) (§7203); *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958), *cert. denied*, 364 U.S. 832 (1960) (§§7202 and 7203); *cf. United States v. Fahey*, 411 F.2d 1213 (9th Cir.), *cert. denied*, 396 U.S. 957 (1969) (§7203); *Edwards v. United States*, 375 F.2d 862 (9th Cir. 1967) (§§7201, 7203, and 7206(2)).

[4]The opinion broadly disapproves of our decisions applying the two-level definition of willfulness, *see* 412 U.S. at 347, 348 n.2, 351 & n.3, and those decisions, as the opinion noted, have concerned criminal tax provisions other than those before the *Bishop* Court. *See* note 3 *supra*. Indeed, the Court's discussion centers on a rejection of the reasoning of *Abdul v. United States, supra*, which concerns §§7202 and 7203. *See*

in the other criminal tax statutes in which it is an element, §§7201-07, including, of course, the provision under which Hawk stands accused, §7203. The reason *Bishop* does not compel inclusion of the term "evil motive" is much simpler: an issue concerning the necessity of employing that language was not presented in *Bishop*. The Court was confronted only with the permissibility of the two-level definition of willfulness, and beyond that nothing in the case related to the precise form of words necessary to convey the meaning of willfulness.

Still, a nagging question remains as to Justice Blackmun's reference to "evil motive"; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive *described* in *Murdock v. United States*, 290 U.S. 389 (1933). In *Murdock* the defendant had declined to answer certain questions relating to his tax liability on Fifth Amendment grounds. He was prosecuted for "willfully" failing to supply information to revenue officials. During the course of the prosecution it was determined that he had not been justified in asserting his Fifth Amendment privilege. Murdock defended arguing that his refusal was not willful. The Supreme Court held he was entitled to an instruction that if his refusal was in good faith—that is, with an honest belief in the protection of the Fifth Amendment—it could not be willful. The thrust of the opinion is that willfulness requires proof that the act was done with knowledge it was wrongful. The Court discussed a number of ways of expressing this type of specific intent, and among the terms mentioned were "bad purpose" and "evil motive." *Id.* at 394. *See also Spies v. United States*, 317 U.S. 492 (1943).

However, neither bad purpose nor evil motive is an independent element of a willful failure to file under §7203. The term "evil

412 U.S. at 351-56. Moreover, the Court read its earlier decision in *Sansone v. United States*, 380 U.S. 343 (1965), as "clearly implying" that "the word 'wilfully' possesses the same meaning in §§7201, 7203, and 7207" thereby "foreclosing" the argument that "'willfully' was to be given one meaning in the tax felony statutes and another meaning in the tax misdemeanor statutes." 412 U.S. at 356. As the Court stated, "Congress used the word 'willfully' to describe a constant rather than a variable in the *tax penalty formula*." *Id.* at 359-60 (emphasis added).

motive" is merely a "convenient shorthand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake." *Boardman v. United States*, 419 F.2d 110, 114 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). Thus the term expresses, in a brief way, the more cumbersomely stated concept of specific intent in *Murdock*, a concept the instructions must ultimately convey. *See United States v. Platt*, 435 F.2d 789, 793-95 (2d Cir. 1970); *United States v. Matosky*, 421 F.2d 410, 412 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970) ("the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to be filed."); *Hayes v. United States*, 407 F.2d 189, 195 (5th Cir.), *petition for cert. dismissed*, 395 U.S. 972 (1969); *cf. United States v. Smith*, 487 F.2d 329 (9th Cir. 1973); *Haskell v. United States*, 241 F.2d 790, 794 (10th Cir.), *cert. denied*, 354 U.S. 921 (1957). This, we think was all that *Murdock*—and *Bishop*—meant by the use of that term.

A number of cases, in accord with this reasoning, have rejected claims that willfulness instructions must include the terms bad purpose or evil motive.[5] In *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, ... U.S. ..... (Feb. 19, 1974), for example, the jury instructions, in a prosecution for willfully subscribing to a false return under §7206(1), omitted reference to either bad purpose or evil motive. The instructions were upheld because they adequately conveyd the notion of *mens rea* without the need of the shorthand terms. *Id.* at 673-74. Similarly, in *United States v. Malinowski*, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973), the defendant, who deliberately overstated the

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[5]A few cases, it is true, have quoted lower court instructions using, or themselves employed, both the "bad purpose" and "evil motive" language. *See, e.g., United States v. Klee*, ... F.2d ..... (9th Cir., March 27, 1974); *United States v. Palermo*, 259 F.2d 872, 881 (3d Cir. 1958); *Abdul v. United States*, 254 F.2d at 293-94. But none of these cases raised the question of whether the term "evil motive" must be used in the instruction. That "evil motive" is a shorthand expression in these cases is illustrated by the many other cases in which the language does not appear, *See, e.g., United States v. Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *United States v. Lachmann*, 469 F.2d 1043, 1044-45 (1st Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *Martin v. United States*, 317 F.2d at 754.

number of his dependents on his withholding form as a protest against the Viet Nam war, was prosecuted for a §7205 willful misstatement of information. He requested a bad purpose instruction so as to provide the jury with an opportunity to acquit based on his anti-war beliefs. A panel of the Third Circuit affirmed the trial court's rejection of the proffered instruction, reasoning that what was central to willfulness was that the act be done with "the specific intent to do something [the defendant] knew the law forbade." *Id.* at 855. "'[B]ad purpose' and 'evil purpose' are not 'magic words' which must be included in a jury charge on willfulness." *Id. See United States v. Douglass*, 476 F.2d 260, 263-64 (5th Cir. 1973); *cf. United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); *Boardman v. United States*, 419 F.2d at 114; *United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *United States v. Clearfield*, 358 F.Supp. 564, 574-75 (E.D. Pa. 1973).

Here, too, the inclusion of the two words "evil motive" in the instructions was unnecessary. While the use of such terms is often helpful, all that is required are instructions which communicate the proper notion of specific intent in understandable terms. The instructions here were adequate to that purpose.

Evidence of Reporting Discrepancies

After being informed that he was under investigation, Hawk had returns prepared and filed by an accountant for the years in which he was delinquent. The accountant was given most, but not all, of Hawk's records and computed Hawk's gross income[6] on the basis of deposit slips for Hawk's commercial checking account plus an additional amount that Hawk estimated he received in cash and did not deposit. Subsequent investigation revealed his gross income to be substantially greater than had been reported, largely for two reasons: (1) because Hawk's estimate of cash received but not deposited was less than his books showed; and (2) because certain of his income was withdrawn from a different account, a trustee account, and was not reported —probably because the accountant was never given the records

[6]Gross income is the only figure relevant since it is the measure of who must file. *See* 26 U.S.C. §6012.

for this account. Evidence of these discrepancies was introduced at trial over the objection of Hawk's attorney. Hawk complains that since he was accused of a failure to file, not tax evasion, the evidence was irrelevant.

The evidence, though not very relevant, was material nonetheless on the issue of willfulness. *See United States v. MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971). First, it showed a pattern of increasing gross income not so clearly reflected in his initially-filed returns. That bore on his motive for failing to file. Second, his continued failure to *fully* disclose his income was relevant to show that the original failures to file may have been prompted by a desire to escape taxation. This, too, bore on willfulness. *Cf. United States v. Magnus*, 365 F.2d 1007, 1011 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *Lumetta v. United States*, 362 F.2d 644, 645-46 (8th Cir. 1966). Moreover, cautionary instructions emphasizing the limited relevance of this evidence were repeatedly given by the trial judge, thereby minimizing any prejudicial effect the evidence might have had.[7]

Hawk's argument that he merely gave the records to an accountant and thus could have had no knowledge of the understatements is unpersuasive. He failed to adequately inform the accountant of or supply the necessary records relating to the understatements, and the jury could have inferred that this was intentional. We conclude the evidence was properly admitted.

Prosecutor's Comment

At one point during the trial, the prosecutor, in discussing an evidentiary point with the judge, asked the court to reserve its ruling "and strike it if it is not tied up, if the defendant goes on the stand." The comment was obviously inadvertent, and the judge immediately instructed the jury to disregard it. Even assuming it was a *prejudicial* comment on the accused's right to remain silent—which we doubt, *see United States v. Altavilla*, 419 F.2d 815, 817 (9th Cir. 1969)—the judge's instruction fully cured

[7]We add a note of caution. Evidence of such limited relevance must be admitted with care. In some instances, the potential for prejudice as well as the dangers of consuming undue time and confusing the jury may be so great as to warrant its exclusion.

it. *See, e.g., United States v. Dana*, 457 F.2d 205, 209-10 (7th Cir. 1972); *United States v. Haili*, 443 F.2d 1295, 1300 (9th Cir. 1971); *Hayes v. United States*, 407 F.2d at 195.

Appellant's other contentions are without merit.

Affirmed.

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[¶ 9347] United States of America, Plaintiff-Appellee v. Charles D. McCorkle, Jr., Defendant-Appellant.

U. S. Court of Appeals, 7th Circuit, No. 73-1084, 4/8/74. Rev'g an unreported District Court Decision.

[*Code Sec. 7203*]

Crimes: Willful failure to file return: Trial.—The Trial Court erred in limiting the defendant's cross-examination of witnesses and in its charge to the jury. Accordingly, conviction for willful failure to file a return was reversed. Since the Government utilized hearsay statements on direct examination, the Government cannot object to the usage of relevant testimony on cross-examination that brings out the whole of those conversations. Furthermore, since the Trial Court's instruction to the jury on the element of willfulness required only a finding of an intention not to file returns, the instructions failed to properly charge the jury. Back references: ¶ 5709.1187, 5709.19 and 5709.2551.

James R. Thompson, United States Attorney, Thomas R. Mulroy, Jr., Assistant United States Attorney, Chicago, Ill., for plaintiff-appellee. William A. Barnett, 135 S. LaSalle St., Chicago, Ill., Charles R. Purcell, 41 E. Pearson St., Chicago, Ill., for defendant-appellant.

Before Swygert, Chief Judge, Castle, Senior Circuit Judge, and Campbell, Senior District Judge.*

Swygert, Chief Judge: Defendant Charles D. McCorkle, Jr. was convicted of willfully failing to file federal income tax returns for 1965, 1966, and 1967 in violation of 26 U. S. C. § 7203.[1] At trial it was stipulated that the defendant had substantial gross income in each of the three years at issue and that he was therefore required to file returns for those years. The evidence was uncontradicted that defendant filed no tax returns for the years 1965, 1966, and 1967. Accordingly, the sole issue before the jury was whether defendant's failure to file was willful.

The defendant raises several issues for our review, the most important of which are: whether the trial court erred in limiting defendant's cross-examination of the Government's witnesses, two Internal Revenue agents; and whether the court properly instructed the jury on the issue of willfulness. The defendant charges error in both respects. We agree.[2]

[*Limitation of Cross-Examination*]

I. In an effort to prove defendant's willful failure to file, the Government presented testimony from two Internal Revenue Service agents, Joseph Powers, an Internal Revenue officer, and Paul Neuhauser, a special agent of the Internal Revenue Service. Both agents testified about statements made by the defendant during the course of conversations conducted by the agents with the defendant during 1969 prior to indictment. On cross-examination the trial court denied defendant's counsel the opportunity to question the agents as to additional statements defendant made to them which allegedly tended to show defendant's lack of wilfulness. The Government contends that the trial court properly limited the scope of the cross-examination in that the testimony of the Internal Revenue Service agents as to these additional statements defendant made to them was inadmissible hearsay. The Government also argues that the testimony sought to be elicited was irrelevant.

Admittedly the statements of defendant testified to by the agents on direct examination were hearsay, but were allowable under the recognized hearsay exception of statements against interest. With respect to the statements by defendant sought to be brought out on cross-examination, the Government properly identifies them as self-serving hearsay declarations. Nonetheless, the principle of verbal completeness prescribes that the defendant may bring out on cross-examination that testimony which might qualify, explain, limit or contradict the portion offered by the Government on direct examination. As the Sixth Circuit stated in *Boening v. United States*, 130 F. 2d 330, 338 (6th Cir. 1942):

> It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] Section 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] We find defendant's contentions with respect to his motion to suppress certain statements made to agent Powers to be without merit. *United States v. Lehman* [72-2 USTC ¶ 9554], 468 F. 2d 90 (7th Cir. 1972). In addition, in view of our holding we need not reach the remaining issues presented by the defendant.

Having utilized hearsay statements on direct with respect to the conversations between the defendant and the agents, the Government cannot object to the usage of testimony on cross-examination that brings out the whole of those conversations simply due to the hearsay nature of that testimony.

The Government seeks support from our decisions in *United States v. Seyfried*, 435 F. 2d 696 (7th Cir. 1970), and *United States v. Lehman*, [72-2 USTC ¶ 9534] 468 F. 2d 93 (7th Cir. 1972). We find those decisions inapposite in resolving the instant appeal, for in neither decision did we confront the problem of verbal completeness. In *Seyfried* we held that the portion of a confession by a third party which exonerated the defendant of any criminal activity was inadmissible due to the fact that the exonerating statement was not a declaration against the third party's penal interest. In *Lehman* we rejected the defendant's attempt to elicit through his witness hearsay statements made to the witness hours after the defendant's confession to Revenue agents; we held that the hearsay declarations did not come within the *res gestae* exception to the hearsay rule.

The Government urges that the proffered testimony sought to be produced on cross-examination was irrelevant to the issue of wilfulness. Specifically the Government argues that the proffered testimony was not relevant to a showing of defendant's state of mind at the time he failed to file. The Government's view of relevancy is unduly restrictive for it cannot be gainsaid that a defendant's subsequent conduct and statements may tend to show an innocent state of mind at a prior time. Our review of the proffered testimony indicates that it is highly relevant to the determination of defendant's state of mind at the time the returns were due and that the trial court erred in excluding it.

[Charge to the Jury]

II. The defendant claims that the trial court erroneously instructed the jury on the meaning of wilfulness as utilized in section 7203. It is asserted that the trial court's error emanates from an improper distinction between the meaning of wilfully as used in the tax felony statutes, *e. g.*, 26 U. S. C. § 7201, and as it is used in the tax misdemeanor statutes such as section 7203. Any semantic confusion which previously existed with respect to the meaning of wilfully has been eliminated by the Supreme Court's decision in *United States v. Bishop* [73-1 USTC ¶ 9459], 412 U. S. 346 (1973). In *Bishop* it is made clear that there is no distinction in the meaning of "wilfully" as utilized in both tax felony and tax misdemeanor statutes. Accordingly, as used in section 7203 wilfully contemplates "a voluntary, intentional violation of a known legal duty." *United States v. Pishop, supra* at 360. The Court in *Bishop*, adhering to its longstanding interpretation of "wilfully" enunciated in *United States v. Murdock* [3 USTC ¶ 1194], 290 U. S. 389, 398 (1933) and *Spies v. United States* [43-1 USTC ¶ 9243], 317 U. S. 492, 497 (1943), noted that proof of wilfulness requires a demonstration of "'bad faith or evil intent'" or "'evil motive and want of justification in view of all the financial circumstances of the taxpayer.'" 412 U. S. 360.

The asserted erroneous trial court instructions on wilfulness were as follows:

> You are further instructed that the wilfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that the defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the required filing date and, hence, have no intent to defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this is all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties.
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> • • •
>
> Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word "wilful" means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.

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The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

[Conclusion]

The above instructions required a mere finding of an intention not to file returns without more. The court explicitly directed the jury that it need not concern itself with whether the defendant intended to defraud the Government. Moreover, the court's instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of wilfulness. The instructions failed to properly charge the jury on the element of wilfulness.[3]

The Government contends that certain of the other instructions given correctly described the element of wilfulness and that consequently the charge taken as a whole was proper. We cannot agree. It is not enough to say that the total charge is rendered proper because the jury may chose to follow the correct statement of the law rather than the incorrect statement of law. Having uttered the incorrect instructions on the element of wilfulness, no additional instruction on wilfulness, albeit correct, could neutralize the misstatement. As the Fifth Circuit has stated: "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." *Mann v. United States* [63-2 USTC ¶ 9563], 319 F. 2d 404, 410 (5th Cir. 1963).

pose." As the court correctly noted, an intent to evade tax or to defraud the government is legally irrelevant to a finding of the intentional violation present in this case, as is a justification based on either inability to pay taxes or an intention to repent and pay taxes some time in the future.

The judgment of conviction is reversed and the case is remanded for a new trial.

[Dissenting Opinion]

CASTLE, Senior Circuit Judge: I respectfully dissent. The trial court properly limited the cross-examination of the Internal Revenue Service agents to exclude from evidence certain self-serving statements made by the defendant, McCorkle, to the agents. Such statements were inadmissible hearsay unprotected by any exception to that evidentiary rule (unlike McCorkle's admissions to which the agents testified on direct examination). The doctrine of verbal completeness does not have currency in this application, where the self-serving statements are clearly unrelated to the admissions so that it is highly unlikely that the former was ever intended to qualify or to explain the latter. *Cf., United States v. Lehman* [72-2 USTC ¶ 9534], 468 F. 2d 93 (7th Cir. 1972). Moreover, the testimony sought to be elicited was irrelevant to a showing of McCorkle's state of mind at the time he chose not to file his tax returns. It is most doubtful that a suspect's subsequent statements to government agents would accurately reflect an innocent state of mind at a prior time. It seems more probable to expect that such statements would reflect a self-serving, exculpatory purpose.

Moreover, I cannot agree that the trial court erroneously instructed the jury on the meaning of wilfulness as expressed in 26 U. S. C. § 7203. Wilfulness is satisfied only by a finding that the taxpayer committed "a voluntary, intentional violation of a known legal duty." *United States v. Bishop* [73-1 USTC ¶ 9459], 412 U. S. 346, 360 (1973). The Supreme Court explicitly established in *Bishop* a standard of *scienter* for conviction under the statute, as the majority pointed out. The instructions of the trial court fully comported with the Supreme Court's interpretation of the statute. The trial court stated to the jury:

> "the word 'wilful' means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent."

The court further emphasized that the *scienter* requirement could only be met by a finding of a deliberate intention not to file tax returns. The trial court thus properly focused on the pertinent legal duty involved in this case in defining "bad pur-

Respectfully, I would affirm the judgment of the trial court.

[¶ 9412] United States of America, Plaintiff-Appellee v. Oscar H. Klee, Defendant-Appellant.

U. S. Court of Appeals, 9th Circuit, No. 73-2741, 3/27/74. Affirming an unreported District Court decision.

[Code Sec. 7203]

Crimes: Failure to pay tax: Willfulness: Various assignments of errors.—Taxpayer's conviction for willful failure to file income tax returns was upheld. Various assignments of errors, including improper instructions to the jury as to the meaning of the term "willfully" and jury misconduct, were without merit. Back reference: ¶ 5709.1163.

Before KOELSCH and DUNIWAY, Circuit Judges, and THOMPSON,* District Judge.

Opinion

DUNIWAY, Circuit Judge: Klee was found guilty by a jury under three counts of an indictment charging willful failure to file federal income tax returns for the years 1966, 1967, and 1968, in violation of 26 U. S. C. § 7203. On appeal he alleges that nine errors were committed during his trial. Most of them do not merit discussion.

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

1. *Instruction defining "willfully"*

Klee asserts that the trial court incorrectly instructed the jury on the meaning of the term "willfully" as used in 26 U. S. C. § 7203.[1] He asserts that the jury should have been instructed that the term "willfully" requires the government to prove "an intent to defraud the government, or to conceal from the government facts relevant to a determination of the accused's tax liability." The law is to the contrary. *United States v. Andros*, 9 Cir., 1973, [73-2 USTC ¶ 9622] 484 F. 2d 531, 534. Klee attempts to rely upon *United States v. Bishop*, 1973, [73-1 USTC ¶ 9459] 412 U. S. 346, yet nothing in that opinion undermines the validity of the instruction given by the trial judge here. The court's instruction is in substantial compliance with the *Bishop* Court's requirement. See 412 U. S. at 360-61.

2. *Juror Misconduct*

When the morning recess occurred during the selection of the jury, the court admonished the jurors:

> "Don't discuss the case among yourselves, and don't allow anyone to approach you and address you concerning the case. Do not form or express any opinion on the case until it is finally submitted to you by the Court for your decision."

A similar admonition was given at the end of the first day of trial. Thereafter, when a recess was taken, the court usually reminded the jury of his admonition, without repeating it.

In support of a motion for a new trial, Klee presented an affidavit of one of the jurors which says that eleven of the fourteen jurors (including alternates) discussed the case during recesses and that nine of the jurors expressed premature opinions about Klee's guilt. If the affidavit is true, the jurors disregarded the court's admonition.

While we are aware that most judges give similar admonitions to juries, we have never had occasion to pass upon either the propriety of or the necessity for such an admonition. The circuits are not in agreement on the question. See, *e. g., Winebrenner v. United States*, 8 Cir., 1915, 147 F. 2d 322; 23A C. J. S. *Criminal Law* § 1361 (1961). *But cf. United States v. Carter*, 10 Cir., 1970, 440 F. 2d 1278, 1279; *Rolado v. United States*, 5 Cir., 1968, 404 F. 2d 316, 317; *United States v. Viale*, 2 Cir., 1963, [63-1 USTC ¶ 15,473] 312 F. 2d 595, 602. Judge Woodbrough, dissenting in *Winebrenner, supra*, said:

> "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters."

We think that there is a good deal in what he says. The important thing is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury. Be that as it may, we need not reach the problem of the propriety of the admonition here.

This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer v. United States*, 1954, [54-1 USTC ¶ 9274] 347 U. S. 227, 229 nor does it involve the influence of the press upon the jury. *Silverthorne v. United States*, 9 Cir., 1968, 400 F. 2d 627.

What is involved here is the premature discussion among the jurors themselves about the case. Assuming that there was juror misconduct, it is still true that not every incident of juror misconduct requires a new trial. *United States v. Goliday*, 9 Cir., 1972, 468 F. 2d 170, 171; *United States v. Collier*, 7 Cir., 1966, 362 F. 2d 135, 137-8; *United States v. Pando*, 2 Cir., 1957, 244 F. 2d 833, 848-9; *Carness v. United States*, 9 Cir., 1951, 187 F. 2d 719, 723. The test is whether or not the misconduct has prejudiced the defendant to the extent that he has not re-

[1] The court instructed, in part:

"The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally, as distinguished from accidental, inadvertent, or negligent.

Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.

The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.

There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law."

ceived a fair trial. *Cozness v. United States, supra*, 187 F. 2d at 723.

The juror's affidavit here does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them. The trial judge carefully examined the affidavit's allegations and ruled that even if everything in the affidavit were true a new trial was not required. Though the judge expressed his disapproval of such juror conduct, he commented that "the question is whether such conduct prejudiced defendant's right to a fair trial by an impartial jury." He correctly observed that "the only genuine issue in dispute was defendant's state of mind. On this point the jury demonstrated its open-mindedness by requesting rereading of the instructions on willfulness before bringing in its verdict." The trial judge therefore held that "[u]nder all these circumstances the Court finds that the affidavit does not present any questions which requires [*sic*] further inquiry and does not justify a new trial."

When a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge "was in a better position than we are to determine whether what happened was "prejudicial." *United States v. Goldfay, supra*, 468 F. 2d at 172, *cf. United States v. Noah*, 9 Cir., 1973, 475 F. 2d 688, 692. It was not error to deny the motion for a new trial.

3. *Klee's motion to appear pro se and through counsel*

The denial of Klee's motion was not error. He had two competent counsel. He does not like the income tax law, or his obligation to file income tax returns. His obvious motive was to be able to spout his notions to the jury without having to take the witness stand. The constitution guarantees Klee the effective assistance of counsel; it does not give him absolute discretion to dictate the form of that representation. Klee does not assert that he was denied effective representation. What Klee wanted was equal status with his attorneys and full rights of participation at every stage of the proceedings. The trial court offered him the opportunity to participate at various stages of the trial but in the interest of courtroom order he limited Klee's activity. The court's action was proper. See *Lofton v. Procunier*, 9 Cir., 1973, 487 F. 2d 434, 435. In *Nelson v. People of the State of California*, 9 Cir., 1965, 346 F. 2d 73 at 81, we said that "counsel must be the manager of the lawsuit" and that "[o]ne of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial." *See also Kuhl v. United States*, 9 Cir., 1966 (in banc), 370 F. 2d 20, 27. Those observations are pertinent here.

4. *Klee's December 13, 1971 tax return*

Klee filed a tax return on December 13, 1971. It contained absolutely no information about Klee's tax status but merely stated "all details available on proper demand." Klee cannot legitimately claim that this return fulfilled his obligation to file. "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." *United States v. Porth*, 10 Cir., 1970, [70-1 USTC ¶ 9329] 426 F. 2d 519, 523. *United States v. Daly*, 8 Cir., 1973, [73-2 USTC ¶ 9574] 481 F. 2d 28, 29. The court was right in telling the jury so.

No other of Klee's assertions of error merits discussion.

Affirmed.

[¶ 9292] United States of America, Plaintiff v. Robert M. Sullivan, Defendant.
U. S. District Court, Dist. Mont., Helena Div., Criminal No. 4518, 1/28/74.

[Code Sec. 7203]

Criminal penalties: Failure to file tax returns.—Taxpayer was convicted of willfully failing to file tax returns for the years 1969-1971. The taxpayer was guilty of no other violations than failure to file the returns but the court recognized that the taxpayer fully knew he had an obligation to file returns and consciously disregarded this obligation. Thus, the taxpayer had acted willfully. Back reference: ¶ 5709.01.

Opinion

SMITH, District Judge: Defendant was convicted on three counts of failing to file federal income tax returns for the years 1969, 1970, and 1971, in violation of 26 U. S. C. § 7203.

On motion for a new trial, or in the alternative for judgment notwithstanding the verdict (treated as a motion for judgment of acquittal), the defendant contends that the evidence was insufficient.

Defendant is a certified public accountant who has been practicing his profession since 1960. About one-third of his gross income was derived from preparing tax returns for others. It is conceded that in each of the years 1969, 1970, and 1971 defendant was, by reason of the amounts of his gross income, required to file income tax returns. In May 1970 defendant requested an extension of time within which to file his 1969 return. That request was denied. On defendant's application dated May 19, 1971, he was granted until May 22, 1971, to file the 1970 return, and on defendant's request dated June 2, 1972, he was granted until June 5, 1972, to file his 1971 return. On September 11, 1972, the Internal Revenue Service mailed defendant a letter requesting that he file his returns. On October 10, 1972, defendant called the Internal Revenue Service and said he would file his returns by October 31, 1972. On November 17, 1972, he filed his 1971 return and paid all amounts due. Defendant was audited for the years 1969, 1970 and 1971, and no additional taxes were assessed. The Chief of the Intelligence Division testified that there is nothing involved in this case except the failure to make timely filings.

There is evidence that in June 1970 plaintiff's wife, who was his office manager, was seriously injured in a boating accident and that this caused some disruption of the defendant's business, but the jury was justified in finding that under all of the circumstances this did not excuse the late filing of the 1969 return, the time for the filing of which had already expired, or for the late filings of the 1970 and 1971 returns, the first of which were not due until eight or nine months after Mrs. Sullivan returned to work. The evidence does show that the office operated in 1969, 1970, and 1971, producing a substantial gross income in each year. There is nothing in the evidence to suggest that the defendant had a purpose to hide his financial transactions from the Government or to evade the payment of tax. The requests for extensions of time, which served to call the attention of the Internal Revenue Service to the fact that defendant had not filed, evidence a consciousness of the necessity for filing and an intention to file at some time. The evidence would not warrant a finding that defendant failed to file to postpone the payments of the tax. There was a net loss in 1972, and as to the other years, although defendant was in debt, his credit was good. He had borrowed money with which to pay income taxes in previous years. There is no remote suggestion that plaintiff was engaged in any off-color activities which a failure to file would conceal. There is no evidence that defendant was in any way concealing or attempting to conceal his true income, and such evidence as bears on that subject would refute a contrary finding. The jury was justified in finding that the defendant knew of his obligation to file and deliberately and intentionally failed to do so because he gave priority to other things or because he simply did not want to be bothered by preparation of his own tax returns.[1]

Convictions have been sustained in the Ninth Circuit on factual situations identical to those here. *Eustis v. United States* [69-1 USTC ¶ 9299], 409 F. 2d 228 (9th Cir. 1969); *Edwards v. United States* [67-2 USTC ¶ 9556], 375 F. 2d 862 (9th Cir. 1967).

However, the rule that the word "willful" has a different meaning in a felony statute than in misdemeanor statutes as announced in *Abdul v. United States* [58-1 USTC ¶ 9453], 254 F. 2d 292 (9th Cir. 1958), and relied upon in *Eustis v. United States, supra*, was specifically rejected by the Supreme Court in *United States v. Bishop* [73-1 USTC ¶ 9450], 412 U. S. 346 (1973). It is clear from *Bishop* that an act to be willful must be done with a bad purpose or evil motive. This poses the very specific question: May we ascribe to a man, who fully realizes his obligation to file but who fails to file because of his preoccupation with something else, the bad purpose or an evil motive required by *Bishop*? A great many things in this modern world are bad or evil only because Congress says so, and Congress does have the power to declare what is bad in the exercise of its power to tax. There is nothing in the law which suggests that a man, to be guilty of a willful failure to file income tax returns, must be motivated to break some other law or to violate some Ten Commandment-type ethic. If by congressional fiat it is bad to fail to file an income tax return, then a bad purpose may be found where the obligation to act is fully known and consciously disregarded.

For these reasons the motion for a judgment of acquittal is denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1873

RICHARD E. HAWK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner, an attorney, was convicted of having willfully failed to file federal income tax returns for the years 1968 and 1969, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. Petitioner was sentenced to one year's imprisonment, six months of which were suspended, to be followed by three years' probation; he was also fined $3,000. The court of appeals affirmed (Pet. App. I).

Petitioner contends that the trial court improperly instructed the jury on the issue of willfulness. The trial court instructed the jury on that issue as follows (Pet. App. I, p. 2, n. 2):

> Now, we come to specific intent and willfulness. The specific intent of willfulness is an essential element of

> the crime of failing to make an income tax return. The term "willfully" used in the statute * * * means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under this criminal law.
>
> * * * The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what the law requires to be done; that is to say, with the bad purpose to disobey or disregard the law that requires him to disclose to the Government facts * * * material to the determination of his income tax liability. * * *
>
> There is no necessity that the Government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. * * *

Petitioner contends that, under this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, the jury should have been expressly instructed that it could convict only upon a finding that his failure to file had proceeded from an "evil motive." The court of appeals properly rejected this contention in an opinion (Pet. App. I, pp. 4-5; emphasis in original) on which we primarily rely:

> Still, a nagging question remains as to Justice Blackmun's reference to "evil motive"; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive *de-*

scribed in *Murdock* v. *United States,* 290 U.S. 389 (1933). In *Murdock* the defendant had declined to answer certain questions relating to his tax liability on Fifth Amendment grounds. He was prosecuted for "willfully" failing to supply information to revenue officials. During the course of the prosecution it was determined that he had not been justified in asserting his Fifth Amendment privilege. Murdock defended arguing that his refusal was not willful. The Supreme Court held he was entitled to an instruction that if his refusal was in good faith—that is, with an honest belief in the protection of the Fifth Amendment—it could not be willful. The thrust of the opinion is that willfulness requires proof that the act was done with knowledge it was wrongful. The Court discussed a number of ways of expressing this type of specific intent, and among the terms mentioned were "bad purpose" and "evil motive." *Id.* at 394. See also *Spies* v. *United States,* 317 U.S. 492 (1943).

However, neither bad purpose nor evil motive is an independent element of a willful failure to file under §7203. The term "evil motive" is merely a "convenient shorthand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake." *Boardman* v. *United States,* 419 F. 2d 110, 114 (1st Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). Thus the term expresses, in a brief way, the more cumbersomely stated concept of specific intent in *Murdock,* a concept the instructions must ultimately convey. See *United States* v. *Platt,* 435 F. 2d 789, 793-95 (2d Cir. 1970); *United States* v. *Matosky,* 421 F. 2d 410, 412 (7th Cir.), *cert. denied,* 398 U.S. 904 (1970) ("the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the

> defendant knew ought to be filed."); *Hayes* v. *United States,* 407 F. 2d 189, 195 (5th Cir.), *petition for cert. dismissed,* 395 U.S. 972 (1969); *cf. United States* v. *Smith,* 487 F. 2d 329 (9th Cir. 1973); *Haskell* v. *United States,* 241 F. 2d 790, 794 (10th Cir.), *cert. denied,* 354 U.S. 921 (1957). This, we think was all that *Murdock*—and *Bishop*—meant by the use of that term.

We further add that the trial court's instruction conformed with this Court's determination in *Bishop* that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The crucial distinction drawn by this Court in *Bishop* was between deliberate, conscious intent, on the one hand, and inadvertence or negligence, on the other; the trial court's instructions properly made that distinction.

Petitioner points out that the decision below conflicts with *United States* v. *McCorkle*, C.A. 7, No. 73-1084, decided April 8, 1974. But the Seventh Circuit granted the government's petition for rehearing *en banc* in *McCorkle* on July 12, 1974, so that the conflict alleged by petitioner may be resolved by the full bench of the Seventh Circuit without any need for further review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[1]Petitioner also suggests that the decision below conflicts with *United States* v. *Tunnell,* 481 F. 2d 149 (C.A. 5). There is no conflict. The court in *Tunnell* merely observed that the evidence amply supported a finding of "evil motive"; no question was raised there concerning the propriety of the jury instructions on willfulness.